STATE OF MICHIGAN

COURT OF APPEALS

SHERRY LYNN HILLER,

Plaintiff-Appellant,

V

RICHARD PETER LONG,

Defendant-Appellee.

UNPUBLISHED
September 14, 2006

No. 267956
Huron Circuit Court
LC No. 04-02628-NI

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff, Sherry Lynn Hiller, appeals as of right a trial court order granting summary disposition in favor of defendant, Richard Peter Long, in this automobile case. Because the trial court properly determined that plaintiff could not demonstrate that her injuries were "caused by" the motor vehicle accident, MCL 500.3135(1), summary disposition was proper, and we affirm.

This action stems from an automobile accident that occurred on January 6, 2003 at approximately 9:55 a.m. in the city of Bad Axe. The accident happened at the intersection of Hubbard Street and Hopson Street which is controlled by stop signs. Plaintiff asserts that she stopped at the stop sign on Hopson, and then proceeded turning left onto Hubbard when defendant's vehicle struck her vehicle. Defendant states that he was not able to stop his vehicle at the Hubbard Street stop sign due to icy roadway and admits colliding with plaintiff's vehicle in a "minimal collision" in the intersection. Plaintiff alleged that she suffered numerous injuries including severe injuries to her spine, back, knees, and shoulders resulting in "debilitating and disabling chronic conditions." Plaintiff claimed that these injuries, together with other emotional injuries, were "the direct and proximate result [of defendant's] negligent actions and omissions." Although the trial court found that plaintiff's injuries amounted to a serious impairment of body function, the trial court did not find that the injuries resulted from the negligent operation of defendant's vehicle. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). It is from this order that plaintiff appeals.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion under MCR 2.116(C)(10), a court considers the affidavits, pleadings, admissions, and all of the other documentary evidence

in the light most favorable to the nonmoving party. *Id*. at 30-31. To survive a motion for summary disposition, the opposing party must present documentary evidence establishing the existence of a genuine issue of material fact for resolution at trial. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The reviewing court on the motion for summary disposition is charged with the responsibility of considering the substantively admissible evidence actually proffered in opposition to the motion. Citing the mere possibility that the claim may be supported by evidence at trial or a promise of future support of the claim is legally insufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The nonmoving party must present more than mere allegations to establish a genuine issue of material fact. *Rice, supra* at 31.

Plaintiff claims that she has suffered a serious impairment of body function, which is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). Whether a plaintiff has suffered a serious impairment of body function is a question of law to be decided by the court, unless there is a factual dispute concerning the nature and extent of the person's injuries that is material to determining whether the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a).

In *Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004), our Supreme Court established a four-step process "to provide the lower courts with a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not." A court must first determine whether there is a factual dispute concerning the nature and extent of the plaintiff's injuries. *Id*. at 131-132. Second, if there is no factual dispute, a court may decide as a matter of law whether the plaintiff has suffered a serious impairment of a body function. MCL 500.3135(2)(a); *Kreiner, supra* at 132. Third, if a court finds that an important body function has been impaired, it must then determine whether the impairment has been objectively manifested. *Id*. Finally, if a court is able to find that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. *Id*. at 132-133.

In this case, the trial court applied the *Kreiner* factors, and found specifically that plaintiff's conditions establish a "threshold injury" under the *Kreiner* framework meaning that they were "objectively manifested" and affect her "general ability to lead her normal life." The trial court went on to find that, despite meeting the *Kreiner* factors, sufficient evidence did not exist on the record to establish that the January 6, 2003 automobile accident was the proximate cause of plaintiff's objectively manifested conditions. On appeal, plaintiff argues essentially that the trial court's analysis should have stopped after it determined a threshold injury existed and should not have "sua sponte recast the issue before it as one of proximate cause." Further, plaintiff asserts that a question of fact regarding proximate cause exists, and therefore summary disposition was improper.

The no-fault act provides:

> A person remains subject to tort liability for noneconomic loss *caused by* his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. [MCL 500.3135(1) (emphasis added).]

Thus, pursuant to this statutory language, causation is clearly a factor in determining whether a party is subject to liability for noneconomic damages under the no-fault act. Accordingly, plaintiff's argument that the trial court engaged in an incorrect analysis regarding causation fails.

To establish causation between an alleged wrongful act and the resulting damage, the plaintiff must show that the defendant's conduct was both a cause in fact and a legal or proximate cause of plaintiff's damages. *Haliw v City of Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001); *Holton v A + Ins Associates, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003). "Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct." *Haliw, supra* at 310. Cause in fact may be established by circumstantial evidence, but such proof "must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994). A plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Id*. at 164-165. A mere possibility of such causation is not sufficient. And when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict in favor of the defendant. *Id*. at 165.

Legal or proximate cause involves examining the foreseeability of consequences and whether defendant should be held responsible for those consequences. *Haliw, supra* at 310. In *Skinner, supra*, our Supreme Court discussed causation at length:

> [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. [*Skinner, supra* at 164-165.]

Hence, causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying a defendant's motion for summary disposition. *Id*. at 172-173. Causation is generally a factual issue to be decided by the trier of fact, but, if there is no issue of material fact, then the question is one of law for the court. *Holton, supra* at 326. The burden of establishing causation is on the plaintiff, and the mere fact of an accident does not create a presumption of causation. *Skinner, supra* at 164.

The offered evidence establishes that an automobile accident took place on January 6, 2003. Plaintiff did not seek medical attention immediately following the accident. Medical records indicate that plaintiff saw her primary care physician, Dr. Lockard, on January 28, 2003, February 17, 2003, March 7, 2003, and March 13, 2003 for complaints relating to asthma, arthritis in her lumbar area and right leg, and an upper respiratory cold. Dr. Lockard's physician's notes for all four visits do not reference the motor vehicle accident. Plaintiff again visited Dr. Lockard on June 27, 2003 complaining of severe back, hip, and knee pain. Dr. Lockard's notes from the visit state that the pain had been "present for years now getting wor[s]e." The notes do not reference the motor vehicle accident. Dr. Lockard referred plaintiff to Dr. McManaman, an orthopedic surgeon.

Plaintiff went to the emergency room at Huron Medical Center on July 6, 2003, with the complaint of "back pain since Feb[ruary,] [motor vehicle accident] in January, also has chronic knee pain." Tests taken on the following day, July 7, 2003 revealed "normal bilateral knees" but also indicated "some degree of paravertebral muscular spasm" relating to her spine Plaintiff consulted with Dr. McManaman on July 22, 2003 complaining of knee pain since February. Dr. McManaman diagnosed plaintiff with "[b]ilateral anterior knee pain with patellofemoral malalignment pain syndrome" and encouraged plaintiff to take care of her back pain, further stating that if she still had knee pain once the back pain is resolved to return for reevaluation. The notes do not reference the motor vehicle accident.

On July 29, 2003, Dr. Pankratz, another orthopedic surgeon, evaluated plaintiff and found "straightforward mechanical back problems" and prescribed pain medication and four weeks of physical therapy. Dr. Pankratz's report indicated that plaintiff represented to him that she suffered from back pain since an automobile accident that occurred in January 2003. The report further stated that plaintiff represented that although she did not think she was injured immediately after the accident, she subsequently began experiencing back pain and went to see Dr. Lockard for the back pain about six weeks after the accident. Importantly, Dr. Lockard's records do not support plaintiff's representation that she went visited Dr. Lockard for the back pain about six weeks after the accident. This point was raised at oral argument on the summary disposition motion, and plaintiff's attorney characterized plaintiff's representation that she visited Dr. Lockard for the back pain about six weeks after the accident as "a little bit of a contradiction" and argued that the medical records could have been "a little mixed up."

Medical records reveal that plaintiff returned to Dr. McManaman on January 27, 2004 complaining of continued knee pain. Dr. McManaman included the following language in his notes: "She mentioned on her last visit (although I did not dictate it) she said that all the pain is from a motor vehicle accident that she sustained on 01/06/03." After clinical examination, Dr. McManaman ordered an MRI on plaintiff's left knee. An MRI report dated February 18, 2004 revealed marked patellar cartilage thinning and a subchondral irregularity attributed to advanced chondromalacia patella, irregular areas along the tibial plateau termed "most likely degenerative," and "small joint effusion."

On March 8, 2004, Auto-Owners Insurance,[1] plaintiff's no-fault insurer, sent a letter to Dr. Lockard inquiring if disability slips it had received from his offices regarding an osteoarthrosis condition was related to the motor vehicle accident at issue. Dr. Lockard responded the next day, March 9, 2004, with the following note: "Ms. Hiller's osteoarthrosis [and] off work slips are not related to a [sic] MVA." A note appears in plaintiff's medical records dated June 29, 2004 stating that Auto-Owners Insurance contacted Dr. Lockard's offices inquiring about a back injury plaintiff alleged she suffered from a motor vehicle accident that occurred over a year ago. The note further indicates that plaintiff's chart was reviewed, and nothing was found mentioning a motor vehicle accident in Dr. Lockard's records. The note goes

[1] The record indicates that plaintiff had instituted a first-party claim against Auto-Owners Insurance, but after reaching settlement, the claim was dismissed by stipulation.

on to state that the only mention of a motor vehicle accident was in Dr. McManaman's record of a visit on January 27, 2004, which included dictation of knee complaints but nothing about a back injury. On July 1, 2004, Dr. Lockard sent a letter to Auto-Owners Insurance without referencing the cause of plaintiff's back pain and did not mention the automobile accident.

In August 2004, plaintiff continued to complain of back, hip, and knee pain to Dr. Lockard. Dr. Lockard ordered an MRI of plaintiff's lumbosacral spine. The MRI report dated September 2, 2004 revealed "[r]elatively subtle asymmetric bulging to the left at the L5-S1 level." It further stated that "[t]his arguably could exert mass effect upon the exiting left L5 root." At plaintiff's request, on September 9, 2004, Dr. Lockard referred her to Dr. Schell, a neurosurgeon. After being contacted by Auto-Owner's Insurance once again seeking his opinion about plaintiff's back problems and their relation to the motor vehicle accident, Dr. Lockard responded with a letter dated September 15, 2004. In the letter, Dr. Lockard responded to the inquiry as follows: "Upon reviewing Miss Hiller's chart, I am unable to say if her back complaints are related to a motor vehicle accident."

Plaintiff consulted with Dr. Schell. In a letter to Dr. Lockard dated October 6, 2004, Dr. Schell stated that plaintiff's MRI suggested the possibility of a small disc displacement as well as some possible mild impingement. Dr. Schell also reported that plaintiff represented that she has had spinal problems dating back to a motor vehicle accident that occurred in February 2003 wherein she suffered a knee injury and pain in her back. Dr. Schell's suggested approach was epidural injections and physical therapy. In another letter dated October 18, 2004, addressed in general "To Whom It May Concern," Dr. Schell summarized his findings and opinions relating to cause as follows:

> Sherry is a patient whom we evaluated for the first time back on October 6, 2004. Her problems were relative to back and radicular leg pain. She does have a bulged disk through the area. It does not look as if it is that problematic. On her entry sheet, she has signed a form indicating that these symptoms began following a motor vehicle accident. If there were no other problems related to her prior to that, I think that it would have to be considered that this may have come from that car accident. I don't have any other information relative to her past history as I had not been her treating physician up until a week or so ago.

Plaintiff received a series of epidural steroidal injections at the Huron Medical Center to treat her back pain in October and November 2004. Plaintiff also continued to treat her back pain with Vicodin ES and Motrin. Medical records reveal that plaintiff continued to treat with Dr. Lockard and Dr. Schell throughout 2005.

In support of her argument that a question of fact exists regarding proximate cause and therefore summary disposition was improper, plaintiff advances only the following argument in her brief on appeal:

> Before the accident [plaintiff] was employed. She no longer is. Before the accident [plaintiff] was physically active. She no longer is. These facts are clearly established by [plaintiff's] deposition testimony.

> Furthermore[,] Dr. Schell opined that a connection between the motor vehicle accident and [plaintiff's] documented back problems existed, particularly in the absence of other trauma or etiology. Thus[,] by virtue of the records of [plaintiff's] neurosurgeon[,] at a minimum a question of fact exists.

In her brief on appeal, plaintiff points only to Dr. Schell's opinion regarding causation as support for a causal connection between her back problems and the accident. But plaintiff mischaracterizes Dr.Schell's opinion. In fact, Dr. Schell's opinion was equivocal at best, stating that her back problems "*may* have come from that car accident. I don't have any other information relative to her past history…" but depended on other factors on which he did not have information. (Emphasis added.)

We have scrutinized plaintiff's medical records and found many inaccuracies and contradictions in what plaintiff reported to various treating physicians. As of June 29, 2004, nearly a year and a half after the accident, Dr. Lockard's records indicate that plaintiff never reported the motor vehicle accident to him despite the fact that she had been treating with him regularly. In fact, when plaintiff presented with complaints of severe back, hip, and knee pain nearly six months after the accident to Dr. Lockard—plaintiff's regular primary care physician—he noted that the pain had been "present for years now getting wor[s]e" in plaintiff's medical records. Dr. Lockard was unable to state if plaintiff's back complaints were related to a motor vehicle accident.

Dr. McManaman's records did indicate a motor vehicle accident, but only mentioned a knee injury and nothing about complaints of a back injury. Dr. Pankratz's report indicated that plaintiff represented to him that she suffered from back pain due to an automobile accident that occurred in January 2003 and that she saw Dr. Lockard for the back pain about six weeks after the accident. There is nothing in the record indicating that plaintiff saw Dr. Lockard for back pain six weeks after the accident. Dr. Schell's records indicate that plaintiff represented that she has had spinal problems dating back to a motor vehicle accident that occurred in February 2003 wherein she suffered a knee injury and pain in her back. However, the record displays that the accident did not occur in February 2003, but rather January 2003.

After viewing the record evidence in the light most favorable to plaintiff, we conclude that plaintiff did not present sufficient evidence to support a genuine issue of material fact that the auto accident caused plaintiff's injuries. To the extent that plaintiff's own statements or testimony indicate the cause of her injuries, it amounts to speculation. Under these circumstances, even when viewing the evidence in a light most favorable to plaintiff, plaintiff did not meet her burden of showing sufficient evidence to create a genuine issue of material fact that the injuries she reported beginning on July 6, 2003 at the emergency room, arose from the traffic accident that occurred on January 6, 2003. Here, the core issue was causation. The lack of foundational development for the proffered opinion on causation by Dr. Schell constituted a fatal defect in plaintiff's obligation to offer admissible evidence in support of her claim. *Smith, supra* at 455; *Maiden, supra* at 121. It was incumbent upon plaintiff to support her claim by either supplemental report eliminating her expert's reservation of opinion, or providing the trial court with an affidavit or deposition of the expert addressing the issue of causation with an appropriate factual and foundational basis free of the reported reservation of opinion. The trial court properly found that plaintiff did not meet her burden of establishing a question of fact on the

issue of causation, and properly granted defendant's motion for summary disposition. *Skinner*, *supra* at 164; *Holton*, *supra* at 326.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio